

**Before the**  
**DEPARTMENT OF COMMERCE**  
**National Telecommunications and Information Administration**

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| <b>In the Matter of</b>  | ) |                                     |
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| <b>Inquiry on Copyright Policy, Creativity,<br/>and Innovation in the Internet Economy</b> | ) | <b>Docket No. 100910448-0448-01</b> |
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**COMMENTS OF AT&T INC.**

Keith M. Krom  
Theodore R. Kingsley  
AT&T Inc.  
1120 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20036  
(202) 463-4148

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**COMMENTS OF AT&T INC.**

AT&T Inc., on behalf of itself and its affiliates, hereby submits these comments in response to the Department of Commerce Internet Policy Task Force (“the Department” or “Task Force”), the United States Patent and Trademark Office (“USPTO”), and the National Telecommunications and Information Administration (“NTIA”) Notice of Inquiry, “Copyright Policy, Creativity, and Innovation in the Internet Economy” (“NOI” or “Notice”).<sup>1</sup>

**INTRODUCTION**

AT&T welcomes the opportunity to outline the measures it has taken to help protect creativity and innovation in the Internet economy through cooperative efforts directed at educating consumers and curbing copyright infringement online. Online piracy of intellectual property through file sharing and other means poses a continuing threat to the economic sustainability of creative artists in all media, as well as to those communities that are linked

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<sup>1</sup> 75 Fed. Reg. 61419, Notice of Inquiry (Oct, 5, 2010) (“NOI”).

economically to them. Although there are legitimate disagreements over the precise scope and scale of online piracy, there can be little argument that online copyright infringement presents unique challenges for rights holders, the creative community, and the broader economy.<sup>2</sup> This ongoing challenge compels adequate responses that operate both to steer consumers of unlawful content toward available lawful content, as well as a revised law enforcement structure that is retooled to meet the unique challenges presented by the digital environment.

Accordingly, AT&T recommends that the Task Force:

- Actively support a private/public partnership framework to help facilitate and validate cooperative efforts between stakeholders and identify best practices;
- Support continuation of the policy balance struck by the Digital Millennium Copyright Act (“DMCA”) while also exploring within this framework the viability of new mechanisms for improved law enforcement that are more responsive to the evolving online environment;
- Ensure that law enforcement, pursuant to appropriate judicial process, remains the primary avenue for copyright enforcement rather than relying on informal, private arrangements to fill an enforcement void; and
- Urge additional international cooperation to curb the availability of online distributors of infringing content and to better educate Internet users about the perils of online piracy and the availability of lawful options.

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<sup>2</sup> As the Notice recognizes, “[d]espite the progress unleashed by the current policy framework, copyright infringement of works online remains a persistent and significant problem.” *Id.* at 61421.

These recommendations are intended to help achieve the proper balance between the NOI's stated intent of developing policies that increase the benefits for rights holders of creative works accessible online and safe guard end-user interests in freedom of expression, due process and privacy.<sup>3</sup>

The issue of online copyright protection is but one concrete example of the range of issues that fall under the broader rubric of the Task Force's proceeding on the Global Free Flow of Information.<sup>4</sup> AT&T, in recent comments filed in that proceeding, has outlined general principles that should inform government actions in connection with the free flow of information over the Internet. Briefly, we believe that government sanctioned mandates to restrict end user access to content should be limited to situations where there is broad social agreement as to the harm being addressed. Within these limited circumstances, governments should be as transparent as possible about any action taken to restrict Internet content, making it clear that government source of the restriction. The reasons for the restriction should be clearly articulated to end users. Service providers should be permitted to inform their customers whenever any access to content is limited by government sanction. Finally, any restriction on online content should be as narrowly tailored as possible and less-restrictive alternatives should be preferred, such as expanding law enforcement capacity, development of alternative property rights dispute resolution mechanisms, and digital citizenship education.

The recommendations here are intended to be consistent with the foregoing principles. Moreover, in order to develop a truly robust response to the problem, all stakeholders in the

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<sup>3</sup> NOI at 61420.

<sup>4</sup> *See Notice of Inquiry, Global Free Flow of Information on the Internet*, 75 Fed. Reg. 60068 (Sept. 29, 2010).

Internet ecosystem – search engines, application providers, network providers, advertisers, equipment providers, publishers, email providers, as well as law enforcement and others – must work together to develop and implement solutions not only to help reduce and deter copyright infringement, but to expand and enhance the availability of lawful content online. Active engagement among service providers, rights holders, governments, and consumers of intellectual property is the single most effective way to address concerns about online piracy by ensuring a balanced and narrowly tailored process that promotes the respective rights of the content community and its online consumers.

**I. THE RIGHTS AND RESPONSIBILITIES OF INTERNET INTERMEDIARIES SHOULD REMAIN CLEARLY DEFINED AS THEY ARE IN U.S. LAW**

Congress established the blueprint for a balanced approach to the role of the relevant online stakeholders in the 1990s through forward-looking measures such as Section 230 of the Communications Decency Act (CDA) and Section 512 of the Digital Millennium Copyright Act (DMCA). For example, Section 230 of the CDA, establishes a cardinal principle that no provider or user of an interactive computer service shall be treated as the “publisher” or “speaker” of any information provided by another information content provider.<sup>5</sup> Section 230 has spurred rapid growth in new Internet services and applications by allowing Internet Service Providers (“ISPs”), Website hosts, social network sites, and others to be free from potential liability for information stored on or moving across their networks.<sup>6</sup>

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<sup>5</sup> 47 U.S.C. § 203

<sup>6</sup> NOI at 60072.

Similarly, the DMCA protects ISPs when they are engaged in good faith efforts to block or remove access to material alleged to be infringing.<sup>7</sup> Section 512 of the DMCA also creates a conditional safe harbor from copyright infringement liability for qualified Internet intermediaries serving as a “mere conduit” for content. Both the DMCA and the CDA are examples of how a government may strike a balance where objectionable or illegal content is removed, while preserving the ability of Internet intermediaries to continue to provide their vital services.

History and experience have shown that when governments clearly define the rights and responsibilities of Internet intermediaries the free flow of information on the Internet is optimized. This model, which provides enterprise investors with clarity and certainty, has been successful beyond measure in promoting the rapid growth of the Internet. It should remain the foundation of USG Internet policy going forward.

The legitimate concerns that governments have about online piracy do not warrant a fundamental re-thinking of this long-standing approach to Internet intermediaries under U.S. law. Internet intermediaries have a clear and important role to play in responding to government concerns within the context of the current domestic Internet intermediary liability legal framework. Therefore, the Task Force should focus on articulating the specific rights and responsibilities of Internet intermediaries within the existing DMCA/CDA framework. In particular, Internet intermediaries should not generally be placed in the position of having to make determinations about whether content is unlawful. Rather, governments should retain the primary responsibility for making sure that courts of appropriate jurisdiction make transparent

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<sup>7</sup> 17 U.S.C. § 512(g)(1).

and methodical legal determinations against alleged providers and users of unlawful Internet content in all cases, and those such providers and users, in every case, are afforded due process protections. Safeguarding the rights of Internet users as well as Internet intermediaries will instill consumer confidence and fuel a virtuous circle of international Information Communications Technology (ICT) investment, deployment and adoption.

As a practical matter, Internet intermediaries are neither created nor organized to exercise discretionary prosecutorial or law enforcement authority or to administer authoritative adjudications and determinations of contested rights and liabilities. Indeed, existing US law is structured in such a way as to discourage ISPs from performing such duties typically reserved to the government by denying liability protection in the event an ISP performs such duties. Thus, the Department should formulate policies that promote the adoption of clear standards and processes by which governments (rather than Internet intermediaries) determine both the lawfulness of Internet content and appropriate and proportionate consequences for trafficking in material that has been authoritatively determined to be unlawful by a government-appointed entity, while at the same time actively promoting cooperative and collaborative efforts to educate consumers between and amongst industry participants.

## **II. AN AUTOMATED NOTICE FORWARDING PROCESS IS A USEFUL TOOL FOR ONLINE COPYRIGHT PROTECTION**

AT&T and other ISPs have long supported rights-holders' intellectual property enforcement efforts to reduce piracy under the DMCA through, among other means, forwarding notices of alleged copyright infringement from rights-holders to its customers.<sup>8</sup> AT&T has developed an Automatic Customer Notification Service ("ACNS") to automate the process of

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<sup>8</sup> As the NOI notes, both the DMCA and Section 230 of the Communications Act of 1934 have "contributed significantly to expansion of the digital economy and [ ] remain essential to promoting innovation and to protecting intellectual property online." *Id.* at 61421.

forwarding notices of alleged copyright infringement from rights holders with whom we have contractual agreements to AT&T subscribers who, in addition to their obligation to abide by the law, are contractually bound through service agreements to respect intellectual property rights online.

AT&T's subscriber Terms of Service and Acceptable Use Policy (AUP) specifically prohibit AT&T customers from using their AT&T-provided broadband Internet service to infringe copyrighted materials. The AUP, for example, expressly provides that AT&T's broadband Internet services:

shall not be used to publish, submit/receive upload/download, post, use, copy or otherwise reproduce, transmit, re-transmit, distribute or store any content/material or to engage in any activity that infringes, misappropriates or otherwise violates the intellectual property rights or privacy or publicity rights of AT&T or any individual, group or entity, including but not limited to any rights protected by any copyright...

Further, it is AT&T's policy to take appropriate action, up to and including terminating, under appropriate circumstances, the broadband services of subscribers who are found, beyond mere allegations, to have violated this policy.

Pursuant to separate contractual agreements, a content owner or its agent may contact AT&T with an allegation that its copyrighted content was being distributed over the Internet by an AT&T subscriber in contravention of copyright laws. The content owner will provide AT&T with the IP address of the AT&T customer associated with the alleged infringing use along with

a date and time stamp of the occurrence and request that the AT&T forward a notice on behalf of the content owner to the end-user that correlates with the IP address initially identified by the content owner. AT&T informs subscribers of these notices by forwarding them electronically to the email address associated with the broadband account holder through the automated process we developed - the ACNS. The ACNS transmittal letter forwarding the copyright holder's notice includes reminders to the customer that copyright infringement is a violation of both U.S. law and the AUP. It also advises the customer that rights holders may choose to seek a court order compelling AT&T to disclose the customer's name and address so that the rights holder can pursue legal action against the customer, and reminds the customer that violations of the AUP may result in termination of the customer's AT&T service.

During this process, we assiduously protect our subscribers' privacy and due process rights and protections. AT&T, when forwarding the notice of alleged infringement, does not disclose its customers' names or other personally identifying information to content owners in connection with the ACNS, except in compliance with lawful process. AT&T does not monitor, investigate, or otherwise take any action against AT&T customers solely based on receipt of a notice of alleged infringement. Significantly, customers who believe the notice is in error are encouraged to contact either AT&T or the copyright holder directly. Moreover, consistent with the DMCA, AT&T will not terminate a customer's broadband services, unless: (1) the customer admits to infringement, or (2) the alleging rights holder has obtained an appropriate adjudication of the customer's repeated infringement.

As automated notice forwarding becomes more widely utilized by ISPs, both rights holders and ISPs may benefit from a more uniform process so that rights-holders and ISPs alike do not have to navigate through myriad differing requirements. To that end, AT&T continues to collaborate with other industry actors in an effort to establish a more uniform noticing system across the industry, including efforts to develop anonymized reporting specifications that would provide meaningful data on the effectiveness of the program. In addition, it has been our experience that various content owners continue to use different formats for notices, driven in part by the variety of third-party providers engaged by content owners for this purpose. We believe that more uniformity may significantly enhance the efficacy of any automated notice forwarding process.

In addition, AT&T believes that there may be additional opportunities to collaborate with other industry participants to enhance the efficacy of the noticing program, to ensure that users fully comprehend the applicability of copyright law in the online environment, and to deter further infringement. In that regard, we will continue to collaborate with other industry actors on the possibility of pursuing such enhancements to make sure users are aware of the possible consequences associated with online copyright infringement.

### **III. AT&T SUPPORTS CONTINUED ENHANCEMENTS IN THE TOOLS AND PROCESS AVAILABLE TO LAW ENFORCEMENT TO ENFORCE COPYRIGHT PROTECTIONS THAT ARE TRANSPARENT AND ENSURE DUE PROCESS PROTECTIONS**

While the notice forwarding efforts have borne obvious fruit, rights-holders nonetheless contend that significant factors impede a fully realized intellectual property rights enforcement regime. These include, on the one hand, the persistent misunderstanding of segments of the online community as to the propriety of unlawful file-sharing and, on the other hand, the lack of

resources and modern legal mechanisms to enable rights-holders and law enforcement to investigate and prosecute civil or criminal violations of the copyrights laws. These impediments are real and persistent. Thus, it is not surprising that rights-holders would turn to whomever and wherever they possibly can to seek a solution, especially when the existing law enforcement structure seems overmatched by 21<sup>st</sup> century digital-theft technologies.

AT&T believes that more can be done, and that the primary issue today is not that copyright laws are inadequate or that the overall balance struck by the DMCA should be realigned, but that the existing enforcement structure is antiquated, slow moving, and not built for today's digital environment. There is a vacuum not only in civil enforcement, due to the lack of an expeditious and proportionate remedy, but also in criminal enforcement, due to the lack of a formalized mechanism for federal law enforcement officials to foreclose major traffickers in illegal content that are not physically located within U.S. jurisdiction. A new law enforcement structure that expeditiously, efficiently and fairly applies existing laws to new technologies, while ensuring due process and adequately and reasonably protecting the privacy of digital citizens, is in order. Making the existing laws more nimble and responsive to the digital environment, rather than informally deputizing ISPs to engage in quasi- law enforcement— is the right course of action for the future. Consequently, AT&T believes that policymakers should consider a mix of new civil and criminal enforcement procedures to remedy existing copyright enforcement shortcomings.

On the civil front, AT&T is sympathetic to the continued frustration of the rights-holder community. These frustrations, which seem rooted predominantly in the inadequacy of governmental processes, have unfortunately led some to propose that non-governmental entities should take on the law enforcement responsibilities and functions reserved for the government.

For example, some rights-holders propose that, in addition to forwarding notices of alleged copyright infringement to our customers, ISPs should terminate or suspend the customer's Internet access service without a court order, and based solely on the receipt of multiple allegations of infringement. Implicit in this proposal is the belief that it is appropriate for ISPs to take on the primary role of evaluating the propriety of copyright infringement claims and defenses, stepping into the roles of both law enforcer and adjudicator to mete out punishment in the form of disconnection or some other penalty. While at AT&T, as discussed above, we are willing to, and actively do, forward notices to our customers today, we nonetheless believe that there are significant legal and policy issues associated with going beyond customer notification and education and taking the next step of punishing our customers based solely on the receipt of multiple third party notices. As we have pointed out, privatized law enforcement is inconsistent with the structure of the DMCA, which discourages ISPs from acting as judge and executioner and denies immunization from liability.

The most fundamental problem with the notion of customer sanctions is that private entities are not created or meant to conduct the law enforcement and judicial balancing act that would be required; they are not charged with sitting in judgment of facts; and they are not empowered to punish alleged criminals without a court order or other government sanction. Indeed, the liability implications of ISPs acting as a quasi-law-enforcement/judicial branch could be enormous. While rights holders are responsible, in the first instance, for determining how they want to exercise their rights, the government and the courts, not ISPs, are responsible for intellectual property enforcement because they, as state actors, can secure and balance the

various property, privacy and due process rights that are at play and often in conflict in this realm.

Moreover, the practical effect from some of the more draconian sanctions, such as termination of service, on Internet users and households could be dramatic. Internet users are increasingly “cutting the cord” and using their home broadband service as their only household connection. They may be using a Voice over Internet Protocol service as their only source for voice communications, including access to emergency services, such as 911. Therefore, any solution where the end result is to suspend or terminate the customer’s broadband service would likely have a broad impact on a household’s core communications needs. Indeed, it would seem counterintuitive to pursue a tactic that necessarily would result in cutting off potentially thousands of customers from the Internet at the same time the government has made clear that it considers broadband access an indispensable lifeline for all families and communities.<sup>9</sup> This is especially true given that, in our experience, less onerous notice-forwarding systems can be highly effective in educating customers and deterring the offending behavior.

Given the myriad negative and unanticipated impacts that are likely to result from any such draconian scheme, it would seem counter-productive, at best, to try to fill an enforcement vacuum by relying on ISPs to perform the functions of police, judge, and jury. To be sure, AT&T grasps why some rights-holders might press for such measures given the inadequacy of the current enforcement regime and the slowness of the legal process, but these steps would only

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<sup>9</sup> See, e.g., Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. March 16, 2010), p. XI (“Like electricity a century ago, broadband is a foundation for economic growth, job creation, global competitiveness and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge.”)

provide rights-holders a rush of short-term satisfaction. The notion of non-governmental players assuming, without legal authority, a role normally reserved for government is unlikely to endure.

There is no silver bullet solution for fighting online piracy. While the government should certainly work to encourage and validate opportunities for more industry cooperation and collaboration, we believe government also should seek to establish new enforcement mechanisms that balance the interests of rights-holders and end users and maintain the government's primary enforcement role. Specifically, AT&T encourages the creation of a streamlined and reasonable adjudication system for rights-holders to resolve civil infringement claims against end users in an expeditious and proportionate manner. As outlined in comments we filed earlier this year with the White House Intellectual Property Enforcement Coordinator,<sup>10</sup> ISPs would be an active participant in this structure: forwarding notices of alleged copyright infringement from rights-holders or their agents to end users while still protecting the end user's identity from disclosure; providing rights-holders with regular reports on the number of end users who have received more than one notice from that rights-holder; appropriately categorizing the total number of notices received; and subsequently providing customer-identifying information to the streamlined claims adjudication body as part of the court-administered adjudication process. In this way, the rights-holder would be permitted an opportunity to present its infringement case and the end user would be given the opportunity to respond via standardized paper, telephonic or digital proceedings developed by the adjudicative body.

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<sup>10</sup> AT&T Comments filed March 24, 2010 with the U.S. Intellectual Property Enforcement Coordinator, *Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan*, 75 Fed. Reg. 8137.

Ultimately, we believe, this adjudication and resolution procedure would provide a meaningful deterrent by heightening end users' understanding that infringement activities are being monitored by the content industry and that there are material consequences associated with their actions.

AT&T also believes that policymakers should consider developing an institutionalized process for identifying websites hosted in countries outside the U.S. that are not covered by the DMCA and that have been judged, following lawful process, to be engaged in widespread and pervasive trafficking in infringed copyrighted works in an open and notorious manner in the U.S. While it is critical that such power be exercised narrowly in clear and limited circumstances, just as law enforcement can close pawn shops that predominantly traffic in stolen goods, so too should law enforcement be empowered to take action against websites whose primary purpose is to traffic in digital stolen goods. The Justice Department, working with other federal agencies, could be given the authority to seek a court order to take action against websites they have publicly identified, including blocking if other less intrusive means are not otherwise available, but only after thorough investigation and judicial due process. Senator Leahy recently proposed legislation along these lines<sup>11</sup> and we urge NTIA to work with his office and other members on an appropriately limited and narrowly tailored approach in the next Congress.

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<sup>11</sup> See S.3804, "Combating Online Infringement and Counterfeits Act." Senator Leahy's bill is one example of recent efforts at establishing more robust procedures to fight the online theft of copyrighted material through an open and transparent judicial process that protects the due process rights of all stakeholders.

## CONCLUSION

AT&T is committed to continued collaboration with rights-holders to help educate users and to curb online copyright infringement. AT&T believes that intellectual property piracy can and should be prosecuted under the applicable civil and criminal statutes now in effect, and that ISPs can and should play the role of trusted middleman in the intellectual property enforcement structure. But ISPs cannot and should not be the Internet's principle enforcer of the copyright laws. This is properly the role of government. In order to strengthen government's ability to pursue this task, a modern enforcement structure should be created that comprehensively addresses the problem. Therefore, AT&T respectfully requests that the coordinated civil and criminal proposals suggested above be considered in a future policy framework.

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
Keith M. Krom  
Theodore R. Kingsley  
AT&T Inc.  
1133 21st Street, N.W.  
Suite 900  
Washington, D.C. 20036  
(202) 463-4148  
*Counsel for AT&T Inc.*